UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,	)	
Plaintiff	)	
v.	)	*Docket No. 02-123-P-C*
TIMOTHY S. KEITER, et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, American Guarantee and Liability Insurance Company, seeks summary judgment in this insurance coverage dispute. I recommend that the court deny the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining

whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following undisputed material facts are appropriately presented in the parties' respective statements of material facts submitted in accordance with this court's Local Rule 56.

On or about June 22, 2001 Kaile R. Warren, Jr. and K. W. Enterprises, Inc. filed an action against Timothy S. Keiter, Timothy S. Keiter, P.A. and Erika L. Frank in the Maine Superior Court (Cumberland County), Docket Number CV-01-337 (the "underlying action"). Revised Statement of Undisputed Material Facts ("Plaintiffs' SMF") (Docket No. 11) ¶ 1; Defendants' Opposing Statement of Material Facts ("Defendants' Opposing SMF") (Docket No. 13) ¶ 1. A copy of the amended complaint in the underlying action is Exhibit A to the complaint in this case. The plaintiffs in the underlying action allege that they sought to retain Keiter to assist in the development of a handyman business franchise concept. *Id*. ¶ 2. Keiter incorporated MelBren Construction, Inc. *Id*. ¶ 4. Fifty shares, representing twenty-five percent, of its common stock were issued to Keiter personally. *Id*. ¶ 4. According to the amended complaint in the underlying action, Keiter subsequently recommended

the development of a new corporation for selling the franchises, and in June 1997 Keiter incorporated Rent-A-Husband, Inc. ("RAH"). *Id*. ¶¶ 6-7. Twenty-five percent of the shares in RAH were issued to Keiter's then wife. *Id*. ¶¶ 7, 9. RAH later changed its name to K.W. Enterprises, Inc. *Id*. ¶ 8. K.W. Enterprises, Inc. is a defendant in the instant action and a plaintiff in the underlying action. *Id*.

The amended complaint in the underlying action alleges that Keiter, Timothy S. Keiter, P.A. and Erika L. Frank (Kennedy) (the "insureds") committed various errors and omissions in providing services. *Id*. ¶ 11. The first five of the six counts in the amended complaint in the underlying action are denominated "Professional Negligence" and are asserted against all of the insureds. *Id*. ¶ 13. Count VI of the amended complaint in the underlying action is entitled "Breach of Fiduciary Duty" and is asserted against Keiter and Timothy S. Keiter, P.A. only. *Id*. ¶ 19. Count VI alleges that Keiter breached his fiduciary duties in the negotiation of a book contract by recommending that all of the royalties go through RAH. *Id*. ¶ 20.

The plaintiff in the instant action issued Lawyers Professional Liability Insurance Policy No. LPL 9230062-2 to Timothy S. Keiter, P.A. on a claims-made-and-reported basis for a policy period of July 27, 1998 to July 27, 1999. *Id*. ¶ 28. A true copy of this policy is Exhibit B to the complaint in this action. *Id*. The plaintiff initially denied coverage for both defense and indemnity in the underlying action. *Id*. ¶ 29. After the complaint in the underlying action was amended, the plaintiff agreed to provide the insureds with a defense subject to a reservation of rights as to both the duty to defend and the duty to indemnify. *Id*. ¶ 30.

The plaintiff in the instant action seeks a declaratory judgment to the effect that it has no duty to defend the insureds under the policy at issue in the underlying action and that it has no duty to indemnify them under that policy. Complaint (Docket No. 1) ¶¶ 33-52.[1]

[1] The plaintiff's motion addresses only the specified policy and only claims asserted against Keiter and Timothy S. Keiter, P.A. (*continued on next page*)

III. Discussion

The parties agree that Maine law applies to this action. Motion at 7; Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Opposition") (Docket No. 12) at 4. *See also Anderson v. Virginia Sur. Co.*, 985 F. Supp. 182, 186 (D. Me. 1998). Under Maine law, the duty of an insurer to defend its insured is determined

> by comparing the allegations in the underlying complaint with the provisions of the insurance policy. If a complaint reveals a *potential* that the facts ultimately proved may come within the coverage, a duty to defend exists.

Maine State Acad. of Hair Design, Inc. v. Commercial Union Ins. Co., 699 A.2d 1153, 1156 (Me. 1997) (citations and internal punctuation omitted; emphasis in original).

> The insured is entitled to a defense if there is any legal or factual basis that could obligate an insurer to indemnify. The complaint must show only a potential that the facts ultimately proved could come within coverage.

Commercial Union Ins. Co. v. Royal Ins. Co., 658 A.2d 1081, 1082 (Me. 1995) (citations omitted). If there is no duty to defend, there can be no duty to indemnify. However, there may well be a duty to defend where, in the end, no duty to indemnify is found.

The plaintiff relies, Motion at 8-9, on the following exclusion in the policy at issue.

> This policy does not apply:
>
> * * *
>
> (h) to any claim based upon or arising out of the work performed by the Insured, with or without compensation, with respect to any corporation, fund, trust, association, partnership, limited partnership, business enterprise or other venture, be it charitable or otherwise, of any kind or nature in which any Insured has any pecuniary or beneficial interest, irrespective of whether or not an attorney-client relationship exists, unless such entity is named in the Declarations. For purposes of this policy, ownership or shares in a corporation shall not be considered a "pecuniary or beneficial interest"

Plaintiff's Motion for Summary Judgment (Docket No. 9) at 1 & Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Motion") (attached to Docket No. 9) at 1, 6. After this motion was filed the parties filed a stipulation of dismissal as to all claims asserted by the plaintiff against the other named defendant, Erika L. Frank, formerly known as Erika L. Kennedy, and all counterclaims asserted by Frank. Stipulation of Dismissal with Prejudice (Docket No. 17). The pending motion addresses all claims remaining in the action.

> unless one Named Insured or members of the immediate family of the Named Insured own(s) 10% of the issued and outstanding shares of such corporation.

American Guarantee & Liability Insurance Company Policy Number LPL 9230062-3 ("Policy") (Exh. B to Complaint) § C(1)(h). It contends that Keiter owned a beneficial or pecuniary interest in MelBren Construction, Inc. and RAH and that all of the allegations in the amended complaint in the underlying action arise out of the insureds' work with respect to these entities. Motion at 9. The defendants respond that the court may not consider Keiter's alleged interest in his client entities because that information does not appear on the face of the amended complaint in the underlying action, and, in the alternative, that 13-A M.R.S.A. § 507(3) barred Keiter from holding any beneficial or pecuniary interest in the client entities. Defendants' Opposition at 4-12. In addition, the defendants contend that the exclusion does not apply in any event to the allegations in Count VI of the amended complaint in the underlying action. *Id*. at 13-14. The plaintiff's response to the latter argument is an assertion, without citation to authority, that "the book deal allegations set forth in Count VI of the Underlying Action are premised on the fact that Keiter owned an interest in the corporations. . . . The negotiation was also for the corporations because the allegations of the Complaint admit that it is customary and standard for the corporations to get a portion of the royalties." Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment (Docket No. 16) at 4.

With respect to Count VI, the amended complaint in the underlying action includes the following allegations.

> 24. In or around 1998, Mr. Warren sought out and was offered a contract to author a "how-to" book that would include some biographical material regarding Mr. Warren.
>
> 25. Based upon Mr. Warren's personality, presentation, and uniqueness, Doubleday, a division of Bantam Doubleday Dell Publishing Group, Inc., agreed to publish a book authored by Mr. Warren. Mr. Keiter and the law firm represented Mr. Warren in negotiating the book contract.

26. Upon information and belief, experts in the field advised Mr. Keiter that the industry standard for dividing the proceeds of such a work was to pay twenty percent (20%) of the book proceeds to a company controlled by the author and eighty percent (80%) to the author directly as an individual.

27. Believing that he personally stood to gain substantially by and through Mrs. Keiter's interest in RAH stock if the book was successful, Mr. Keiter advised Mr. Warren to structure the book contract such that *all* proceeds would be paid to RAH with no proceeds to be paid directly to Mr. Warren. Mr. Keiter further advised Mr. Warren that the book contract had to be structured with the entire proceeds payable to RAH in order to protect the Rent-A-Husband trademark.

28. Upon Mr. Keiter's advice, the book contract was structured such that all proceeds were paid to RAH with none of the book proceeds paid directly to Mr. Warren.

29. Mr. Keiter so advised Mr. Warren to structure the contract will all proceeds paid to RAH without advising Mr. Warren of the conflict of interest that existed by virtue of Mr. Keiter's marital relationship with the purported owner of a substantial number of RAH's shares.

* * *

83. At the time Mr. Keiter negotiated the book contract on behalf of Mr. Warren, Mr. Keiter represented both Mr. Warren and RAH and was directly and closely related to the purported owner of a substantial number of RAH's shares, Mrs. Keiter.

84. Mr. Keiter did not seek, nor did Mr. Warren or RAH provide, consent for the negotiation of the book contract or a waiver of the conflict of interest that existed by virtue of Mr. Keiter's marital relationship with Mrs. Keiter.

85. By advising Mr. Warren to negotiate a contract in which the proceeds of the book were made payable entirely to RAH, Mr. Keiter placed himself in a position to unfairly and improperly gain in the transaction through Mrs. Keiter's purported interest in RAH. Through this transaction, Mr. Keither took affirmative steps to obtain financial gain at the expense of his client.

86. Mr. Keiter's conduct in negotiating the book contract was a breach of the fiduciary duties owed [by] him and the law firm to Mr. Warren.

Amended Complaint, *K.W. Enterprises, Inc., et al. v. Timothy S. Keiter, et al.*, Maine Superior Court (Cumberland County), Docket No. CV-01-337 ("Underlying Complaint") (Exh. A to Complaint), ¶¶ 24-29, 83-86.

Contrary to the plaintiff's contention, these paragraphs of the amended complaint in the underlying action do not allege that Keiter undertook the book contract negotiation "for the corporations." They allege that he undertook the negotiation for Warren as an individual and breached his duty to Warren as his individual client by arranging for all of the proceeds to go to RAH, in which Keiter had a beneficial or pecuniary interest, rather than to Warren. The allegations may well be read to present activity that resulted in a benefit to RAH, but that is not the test under the policy language on which the plaintiff relies. The allegations cannot reasonably be read, as required by Maine law at this stage of this proceeding,[2] only to constitute a claim "based upon or arising out of" work performed by Keiter "with respect to" RAH, in the language of the policy exclusion. Accordingly, the plaintiff has a duty to defend its insureds with respect to Count VI of the amended complaint in the underlying action. Consideration of its duty to indemnify its insureds on that claim is premature at this point. *Penney v. Capitol City Transfer, Inc.*, 707 A.2d 387, 389 (Me. 1998).

With respect to Counts I-V of the amended complaint in the underlying action, the plaintiffs could be entitled to summary judgment at this stage only if it were possible to decide the coverage issue on the basis of the allegations in the amended complaint alone, without resort to extrinsic facts. *E.g., Patrons Oxford Mut. Ins. Co. v. Garcia*, 707 A.2d 384, 386-87 (Me. 1998). Here, it is clear that the plaintiff's motion relies on extrinsic facts, and that those facts are disputed. Plaintiff's SMF ¶¶ 33-37; Defendants' Responsive SMF ¶¶ 33-37. Based on the allegations of the amended complaint alone, *e.g.*, Underlying Complaint ¶¶ 14-15, 18-20, 23, it is possible that the exclusion on which the plaintiff relies may not apply. None of the exceptions provided by Maine law to the comparison test

[2] *J.A.J., Inc. v. Aetna Cas. & Sur. Co.*, 529 A.2d 806, 808 (Me. 1987) ("Any doubt about the adequacy of the pleadings to bring the occurrence within the coverage of the insurance policy should be resolved in favor of the insured."); *see also Gross v. Green Mountain Ins. Co*., 506 A.2d 1139, 1141 (Me. 1986) ("Exclusions and exceptions in insurance policies are generally not favored.").

for determining coverage, *Garcia*, 707 A.2d at 386, are implicated in this case. *See also York Ins. Group of Maine v. Lambert*, 740 A.2d 984, 985 (Me. 1999).

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of April, 2003.

_____
David M. Cohen
United States Magistrate Judge

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